BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY L. PAGE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,466
ENSMINGER GRAIN	)	
Respondent	)	
AND	)	
	)	
INSURANCE CARRIER UNKNOWN	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 30, 2008, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant was seriously injured on April 19, 2007, when he fell through the roof of a grain elevator. After finding that respondent was engaged in an agricultural pursuit, Judge Klein denied claimant's request for benefits. The Judge reasoned, in part:

> Ensminger [G]rain is a farm operation, run by two brothers, that runs cattle and grows grain. There is also an elevator on site where grain is cleaned. Primarily, this elevator services the grain grown on Ensminger [F]arms, but occasionally grain is cleaned for neighbors and other farmers in the area as a service.
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> . . . .
>
> The Court, applying the analysis from *Whitam* [sic] *v. Paris* [sic], 11 Kan[.] App[.] 2d 303, finds that the Respondent is an agricultural pursuit, and that cleaning grain is commonly understood as an agricultural pursuit. There are no unique characteristics of Ensminger [G]rain to disturb that judgement.
>
> However, even if Ensminger [G]rain is a mixed business, the Court would find that working on the elevator in these circumstances was engaged in an employment incident to the agricultural pursuit at the time of his accident.

> Coverage is denied based on the above findings[.][1]

Claimant contends Judge Klein erred. Claimant argues that he was injured while working for Ensminger Grain and Seed, which he alleges is a commercial grain and seed company that is owned by brothers Alden and David Ensminger. Consequently, claimant challenges the Judge's finding that he was injured in an agricultural pursuit. In addition, claimant contends he has proven respondent had a payroll exceeding $20,000 per year and, therefore, his accident is compensable under the Workers Compensation Act.

First, respondent contends claimant's accident was incidental to its farming operation as claimant was on the elevator roof to close a cover that would protect respondent's grain from the weather. Respondent denies that it cleaned seed for other farmers during the period in question but admits that it would infrequently sell seed to area farmers. Nonetheless, respondent contends that cleaning seed for area farmers and selling seed to them is not particularly relevant as those acts are merely part of respondent's agricultural pursuit. Respondent's argument in that regard may be summarized, as follows:

> Applying this analysis to the facts of this case, it is seen that the general nature of the employer's business [is] to raise farm products and sell them. This is a pure agricultural pursuit. In this regard, it would not seem to make any difference where the Respondent chose to sell its product; whether the product was being trucked to elevators in Catoosa, Emporia or Wichita as stated, or whether these farmers occasionally decided to sell some of their product as seed to other local farmers. It would seem to make no difference where the agricultural products are sold; the character of the Respondent's business is the same regardless of this fact, as noted by the Administrative Law Judge where he found that cleaning grain is commonly understood as an agricultural pursuit and that there were no unique characteristics of Respondent to disturb that particular judgment.[2]

Second, respondent contends the Workers Compensation Act does not apply to this accident as claimant failed to prove it met the $20,000 payroll requirement of K.S.A. 44-505(a)(2). Because the Judge did not address this issue, which respondent raised at the preliminary hearing, respondent questions whether the Board has the jurisdiction to address it for the first time on this appeal. Should the Board have the authority to address the payroll issue at this time, respondent argues the exhibits attached to both preliminary

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[1] ALJ Order (May 30, 2008) at 1, 2

[2] Respondent's Brief (filed June 30, 2008) at 6.

hearing transcripts[3] show a payroll less than $20,000. Accordingly, respondent argues only sheer speculation places respondent's payroll over $20,000 for either 2006 or 2007.

In short, respondent requests the Board to affirm the May 30, 2008, Order.

The issues before the Board on this appeal are:

1. Is the Workers Compensation Act applicable to claimant's accident or, instead, does claimant's employment fall outside the Act as an agricultural pursuit?[4]

2. Does the Board have the jurisdiction to review for the first time on appeal whether respondent's payroll was sufficient to bring the parties within the provisions of the Workers Compensation Act? If so, did claimant satisfy his burden of proof?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned finds:

There is no dispute that on April 19, 2007, claimant fell through the roof of a grain elevator and sustained serious injuries. Claimant's related medical expense has grown into the tens of thousands of dollars.

David Ensminger, who appeared at both preliminary hearings, testified he and his brother Alden raised soybeans, wheat, and milo in a farm operation they called Ensminger Grain which they owned in equal partnership. Mr. Ensminger testified they did not farm any land other than their own. He also denied that they stored anyone else's grain. And, excepting his brother-in-law, Mr. Ensminger initially denied they provided any services of any kind for anyone, including cleaning seed for other farmers or selling them seed.[5]

According to David Ensminger, he and his brother formerly operated a commercial seed business in which they cleaned and sold seed. But he estimated they discontinued those activities approximately 10 years ago. Nevertheless, on the highway outside the grain elevator and seed plant there was a sign during the time period in question that

[3] There have been two preliminary hearings held in this claim. The first was held on January 9, 2008, and the second was held on May 14, 2008.

[4] See K.S.A. 44-505(a)(1).

[5] P.H. Trans. (Jan. 9, 2008) at 23.

advertised certified beans for sale in 50-pound bags and 60 pounds bulk. Moreover, in a December 2007 publication of *Farm Talk Newspaper*, Ensminger Seed advertised thousands of bushels of "3-way seed oats," grain, forage, and hay for sale by the bag or in bulk. When asked about the sign and advertising, David Ensminger was at first unable to provide any explanation as his brother handles that part of their business. But he later suggested his brother Alden "probably does that to keep his name before the public because he is on several state boards."[6]

But that was not the only information David Ensminger did not possess. In short when questioned about the hours different employees regularly worked or their hourly pay rate, he did not know as Alden tended to those matters.[7] David Ensminger did testify, however, that in 2007 they paid at least $500 weekly wages in cash.[8] And that was in addition to the wages they were paying by check. But Mr. Ensminger later testified at the May 2008 hearing that they paid $15,581 in payroll for 2007 and that sum included the cash payments to their various employees.[9]

David Ensminger testified he appeared in place of Alden because Alden was deaf.

In addition, on July 6, 2007, the State of Oklahoma issued a seed retail license to Ensminger Seed Co. and on September 1, 2007, the State of Kansas issued Ensminger Seed a wholesaler/retailer seed license.

Claimant testified he was initially hired to work in the mechanic shop at the farm but Alden Ensminger then sent him to work at the elevator or seed plant after "probably half a month."[10] Claimant testified that at the elevator and seed plant he worked with Rodney Fry, who worked at both the seed plant and on the farm; a secretary, whom claimant believed worked full time at the seed plant; and Tom Stinett, who worked when he was not in school. (The record is not entirely clear, but either a part-time or full-time truck driver may have also worked at the seed plant.) Like David Ensminger, claimant testified that some of his co-workers were paid in cash and some by check. Claimant's testimony that he was paid in cash at the rate of $6 per hour is uncontradicted.

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[6] *Id.* at 30, 31.

[7] *Id.* at 42, 43, 44.

[8] *Id.* at 45.

[9] P.H. Trans. (May 14, 2008) at 74.

[10] P.H. Trans. (Jan. 9, 2008) at 9.

In contrast to David Ensminger's testimony, however, claimant testified he worked at least 40 hours per week. Moreover, claimant testified they sold seed to customers and they bagged seed for others.[11]

Also in contrast to David Ensminger's initial testimony, Rodney Fry testified that when he worked at the seed plant from July 2006 to December 2007 they cleaned wheat and beans for others in addition to the crop that was grown on the Ensmingers' land. But most of the seed they cleaned came from the public and they also sold the Ensmingers' wheat seed and bean seed to the public.[12]

Mr. Fry testified he was paid $7.50 per hour and he regularly worked at least 40 hours per week. He also confirmed the secretary at the seed plant worked full time but he believed the truck driver at the seed plant only worked part time.

Responding to Mr. Fry's testimony, David Ensminger indicated Mr. Fry was not a credible witness as he will say anything and left their employment under bad circumstances. Mr. Ensminger also testified that Mr. Fry spent most of his time on the farm working in the farm shop and, therefore, he was not in any position to know where the grain originated that would be cleaned. David Ensminger denies threatening Mr. Fry about testifying in this claim and states that a recent visit to his house was in response to his attorney's request to find out what Mr. Fry knew about the farm operation. Mr. Ensminger testified, in part:

> Q. (Mr. Reynolds) Did you threaten Mr. Fry?
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> A. (David Ensminger) No, certainly not. I just went down to see him one day and told him that it's not a good idea to get involved in other people's business and that's all I said. I didn't mention Jerry Page or anybody or no threat at all.[13]

In contrast to his January 2008 testimony, at the May 2008 hearing David Ensminger testified that they did sell some of their seed to other farmers but they did not have very much of that business any more.[14] He also further explained that Alden gets free advertising from *Farm Talk Newspaper* for writing a column and that Alden always puts something in the paper whether or not they have it for sale. David Ensminger reiterated

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[11] *Id.* at 9.

[12] P.H. Trans. (May 14, 2008) at 11.

[13] *Id.* at 29.

[14] *Id.* at 59, 60.

they used to operate the seed plant as a commercial operation but that was years ago. But now the elevator and seed plant is used mostly for storage although they do clean seed for their own purposes. But when questioned whether they have sold seed to specific farmers or cleaned seed for them, Mr. Ensminger said he did not know as he does not run the seed plant and does not spend his time there.[15] Finally, Mr. Ensminger admitted he had obtained workers compensation insurance in the past.

At this juncture, the undersigned finds the evidence establishes that several employees were working at the seed plant in addition to claimant and Mr. Fry, including a secretary, truck driver, and a part-time worker. Considering that respondent is licensed to sell seed, advertised seed and forage for sale, regularly performed cleaning services for others, and regularly sold seed at retail, the undersigned finds the Ensmingers were, in addition to raising grain, also operating a commercial enterprise at the seed plant at the time of claimant's April 2007 accident. The evidence also establishes that claimant primarily worked at the seed plant.

CONCLUSIONS OF LAW

The Workers Compensation Act does not apply to employment that is considered an agricultural pursuit or that is incidental to such a pursuit.[16]

In *Whitham*,[17] the Kansas Court of Appeals listed three factors as a framework for determining whether an employment is an agricultural pursuit within the meaning of the Act. Those factors are: (1) the general nature of the employer's business, (2) the traditional meaning of agriculture as the term is commonly understood, and (3) any unique characteristics of the business. And in *Frost*,[18] the Court of Appeals held the general nature of the employer's business determines whether the activity resulting in injury was incidental to an agricultural pursuit. According to *Larson's Workers' Compensation Law*, excessive specialization, commercialization, and marketing by a farmer may cause activities to lose their agricultural status.[19]

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[15] *Id.* at 66.

[16] K.S.A. 44-505(a)(1).

[17] *Whitham v. Parris,* 11 Kan. App. 2d 303, 720 P.2d 1125 (1986).

[18] *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 760 P.2d 43 (1988).

[19] 4 *Larson's Workers' Compensation Law* § 75 (2007).

In *Frost*, the Kansas Court of Appeals sets out the steps in determining whether a worker was engaged in an agricultural pursuit at the time of his or her accident.

> The first step is to determine whether the employer was engaged in an agricultural pursuit. If the answer to this question is no, then the court may find that there is coverage. If the answer is yes, then the court proceeds to the second step, which is to determine if the injury occurred while the employee was engaged in an employment incident to the agricultural pursuit. If the answer to that question is also yes, then the employee is not covered by the Act. If the answer to that question is no, then there is coverage.[20]

As indicated above, claimant worked at the Ensmingers' seed plant, which was operated as a commercial venture. And that enterprise may be viewed as apart from the Ensmingers' farming operations as it is not part of raising grain but, instead, a commercial enterprise involved in the sale and distribution of product. And such a commercial venture would not generally be considered an agricultural pursuit within the traditional meaning of agriculture.

When a worker's regular employment qualifies as either covered or exempt work under the exception for agricultural pursuits, an occasional excursion into or out of those regular duties should be disregarded.[21] Accordingly, the argument that claimant was on the roof of the elevator performing work for the Ensmingers' farming operation, rather than performing work for the seed plant, is not relevant.

The undersigned concludes claimant's employment by the Ensmingers at the seed plant was not employment in an agricultural pursuit for purposes of the Workers Compensation Act. Accordingly, claimant's accident may be compensable under the Act should the evidence establish the requisite payroll. As the Judge did not address the payroll issue, this claim should be remanded for a ruling on that issue.

Consequently, the May 30, 2008, preliminary hearing Order should be reversed and this claim remanded for further proceedings.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[22] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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[20] *Frost*, 13 Kan. App. 2d 5, Syl. ¶ 2.

[21] 4 *Larson's Workers' Compensation Law* § 75 (2007).

[22] K.S.A. 44-534a.

by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned reverses the May 30, 2008, Order and remands this claim to the Judge for further proceedings consistent with the above. In addition to addressing the payroll issue and claimant's request for benefits, the Judge and parties should also address who the appropriate respondent (or respondents) is (are) in this proceeding.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Zackery E. Reynolds, Attorney for Respondent
Thomas Klein, Administrative Law Judge